

4-1-1989

The Use of History in Canadian Constitutional Adjudication

Frederick Vaughan
University of Guelph

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Courts Commons](#), and the [Legal History Commons](#)

Recommended Citation

Frederick Vaughan, "The Use of History in Canadian Constitutional Adjudication" (1989) 12:1 Dal LJ 59.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

I. Introduction

It is only in recent years that the use by judges of extrinsic materials has become an issue openly discussed in Canadian legal periodicals. Chief Justice Brian Dickson virtually occasioned a debate on the question in a public address in 1979.¹ The Chief Justice said: "... the Supreme Court of Canada recently signalled an increasing receptiveness to the use of extrinsic materials in the *Anti-Inflation Reference*. Accordingly, I expect that we will see an increasing use by appellate courts of extrinsic evidence".² Dickson gave the impression that extrinsic material was not widely used by Canadian courts prior to the *Anti-Inflation* case. The purpose of this paper is to show that one form of extrinsic material — historical evidence — has long been used with confusing results in Canadian constitutional cases.

II. What Is and What Is Not History

Those who have taken the trouble to explore the problem of the use of history by judges usually find that it is not easy to say what specifically "history" means. For example, the use of precedent in the common law tradition is an important use of history. The common law judge is virtually commanded to rummage throughout past cases in aid of his judgment. And no one would suggest that it was improper for him to do so. Indeed, counsel at trial will spend most of their energies attempting to show that the case at bar must be resolved on the authority of a line of cases stretching back many decades. No common law judge could ignore the weight of a preponderant line of precedent. It is for this reason that the common law tradition demands that a judge must give cogent reasons for departing from precedent. To do so casually would rob the application of the law of its continuity and hence its legal certainty. This form of history is then beyond dispute. It is an essential aspect of the judge's task. This is not to suggest that Canadian courts blindly adhere to *stare decisis*. Indeed, the trend in Canada is clearly towards a flexible use

*Department of Political Science, University of Guelph.

1. See, eg., W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983), 72 *Dalhousie Law Journal* 7.

2. "The Role and Function of Judges" (1979), *The Law Society Gazette* 138 at 163.

of precedent.³ The Supreme Court of Canada, for example, "has explicitly refused to follow a prior (Judicial Committee) decision in several cases".⁴

But is that same common law judge permitted to use historical material relating to the times in which a given statute was enacted as an aid to understanding the nature of the "mischief" aimed at? Is it proper, for example, to appeal to the sociological conditions prevalent throughout Canada at the passage of the *Canada Temperance Act* as Viscount Haldane did in *Snider*? The use of historical material in such circumstances would appear to justify its use anywhere. Why, for example, should one be denied the right to an historical exposition of an important item in the Canadian *Criminal Code* if it can be shown, as in the *Shortis* case, that a typographical error had devastating consequences for an accused?⁵ Or, does the record show that we are operating under a double standard: history may be used in constitutional cases but not in criminal cases? Is there a case to be made for the proposition that constitutional statutes are of a different kind and hence appropriately amenable to historical support? Do constitutional cases force the courts back to history in an effort to uncover the intention of Parliament? If so, why is the intention of Parliament no less important in criminal matters?⁶ Why must courts be strictly confined to the language of the enactment in the interpretation of contracts and permitted to appeal to history in constitutional cases? There are no easy answers to these general questions but answers must, nevertheless, be found in particular instances.

The use of history is compounded further by the uncertainty of the historical enterprise. The historical record is rarely so certain as to provide a sure guide. Indeed, the historical record is frequently the product of an historian who may have serious biases and prejudices. As Clifford Ian Kyer has written citing the celebrated British historian, E.H.

3. See Gordon Bale, "Casting off the Mooring Ropes of Binding Precedent" (1980), 58 Canadian Bar Review 259.

4. Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985), at 183; see also Frederick Vaughan, "Precedent and Nationalism in the Supreme Court of Canada", 6 American Review of Canadian Studies 2.

5. See Martin L. Friedland, *The Case of Valentine Shortis* (Toronto: The Osgoode Society, 1986), especially 38-41.

6. For a good account of what is taking place in the Supreme Court of Canada in the construction of criminal cases, see Justice Lamer's judgment for a unanimous court in *Paul v. the Queen* (1981). "... before applying mechanically and somewhat blindly any rule of construction to the words of the section (of the *Criminal Code*) it is imperative that we closely scrutinize the origin of the rule, its evolution over the years, the evolution of the context in which it had been originally developed, and hopefully discover the reasons why it is today with us in its present formulation". These comments precede a section of Lamer's judgment entitled "The History of Section 645 (4)".

Carr, "Before you study the history, study the historian".⁷ Kyer concludes that "it is unrealistic to expect our judges to do good history". Indeed, if Kyer is correct it would be unrealistic to expect professional historians to do "good history". Not only do professional historians frequently disagree over an interpretation of a given historic event — such as the events surrounding Confederation — but the historical record itself is often incomplete or unclear. We must realize, he counsels, "that the materials available to ascertain the intentions of the Fathers of Confederation are scanty and in many ways deficient for constitutional purposes. What documents exist do not provide clear answers to the questions asked of our courts. Rather they present problems of evaluation and interpretation".⁸ Kyer's general conclusion is that due to the fact that "historical truth is very elusive", "history does not hold the answers to the constitutional questions we pose for our courts". Indeed, he asserts that "the use of historical materials presents a threat, namely, that historical arguments may well mask essentially political decision-making".⁹ Unfortunately, Kyer does not explore further this intriguing issue. It would be hard to imagine constitution-making that was not a form of "political decision-making". We will return to this point later in a discussion of the problem of intention of the framers.

It is important to understand that Kyer does not dismiss or discount all forms of history. He approves of the use of statutory history by the Supreme Court of Canada as in the *Blaikie* case where the Court referred to the Quebec Resolutions. Kyer sees the "use of other statutes to determine the meaning to be given a statute under consideration such as was done by Chief Justice Laskin in *Jones*,¹⁰ as a long-standing technique of statutory interpretation . . . I see no reason why this sort of historical inquiry ought not to be used in constitutional cases. It is another story, I would suggest, with the use of the documents of Confederation".¹¹ He explicitly excludes the documents of Confederation from use by judges in determining the use of such central terms of the *Constitution Act, 1867*, as "trade and commerce", "property and civil rights in the province", and "administration of justice in the province". Kyer claims that the available documents do not assist the courts in understanding precisely what was meant by these phrases. But could one not argue in reply that the

7. The most recent Canadian discussion of this issue is by Clifford Ian Kyer, "Has History a Role to Play in Constitutional Adjudication: Some Preliminary Observations", *The Law Society Gazette* 135.

8. *Id.*, at 151.

9. *Id.*, at 157.

10. *A.G. for Quebec v. Blaikie* (1978), 95 D.L.R. (3d) 42.

11. Kyer, *supra*, note 7 at 140.

available documents provide a context within which to achieve, at a minimum, an understanding of the general framework of these terms? the available documents give Kyer sufficient clarity as to be able to say with confidence that both John A. Macdonald and George Brown "wished to have a strong central government and to reduce the provincial governments to essentially municipal institutions."¹² If the documents provide certainty on this important matter, might they not provide equally enlightening guidance on the scope of the "peace, order and good government" clause, especially since the documents show that the phrase was "peace, *welfare* and good government" until the fourth draft of the Confederation bill?¹³ Indeed, would not this form of historical evidence become statutory history and hence admissible?

A close examination of the long and often acrimonious debate over the meaning of the major terms of the *Constitution Act, 1867*, reveals that those who advocate strong provinces are most insistent on excluding the historical record surrounding Confederation. That record as W.P.M. Kennedy and others have demonstrated does little to support the rise of autonomous provinces. These same defenders of strong provinces who eschew the use of Confederation history are quick to justify the decentralizing work of Judicial Committee by the use of contemporary history or as Alan Cairns prefers "the sociological realities" of the times. G.P. Brown, on the other hand, commends the law lords for avoiding this historical pitfall.¹⁴

III. History and Judicial Discretion

W.H. Charles writing in the *Dalhousie Law Journal* recently addressed the use of extrinsic evidence in the context of judicial discretion.¹⁵ It is a valuable contribution to the debate. Charles' article does not deal formally with the use of history as an extrinsic aid to judicial interpretation. He does, however, invite consideration of the problem of history as an element of judicial discretion. This leads directly to the problem of the judicial function. Charles asks: "How far beyond the

12. Kyer, *supra*, note 7 at 156.

13. The draft copies are preserved in the Macdonald Papers, M.G. 26A1(a), Vol. XLIX, Part 2, P.A.C.

14. Browne, *Documents on the Confederation of British North America*, (Toronto, 1969) at XXVI. For an interesting discussion of the use of English law in pre-Confederation British North America, see G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985), 3 *Law and History Review* 219, especially 249-251. See also Elizabeth Gasper Brown, "British Statutes in the Emergent Nations of North America: 1606-1949" (1963), 7 *American Journal of Legal History* 95.

15. W.H. Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983), 7 *Dalhousie L.J.* 7.

actual words of the statute itself is it permissible for courts to roam in their efforts to interpret legislation?"¹⁶ He claims that this question leads directly to further "questions about the proper constitutional function of a court and the exercise of judicial discretion". In general, Charles observes, the common law tradition permits the use of statutes in *pari materia* and previous versions but excludes legislative history of debates in *Hansard* and related material. In this he is in agreement with Kyer. But Charles explores the actual practice of Canadian courts and finds a growing departure in more recent decades from the general common law rule. A major reason for the departure, he claims, is the emergence of Law Reform Commissions. "Courts have found it increasingly difficult to ignore the guidance and assistance provided by Law Reform Commission studies and reports when called upon to interpret the provisions of a statute enacted pursuant to such a report".¹⁷ The result in Canada has been that the courts have used Law Commission and even Royal Commission reports. It is reasonable that the courts should make use of such studies and reports because they represent the products of very talented and highly qualified legal experts. In a certain sense they can be perceived as research assistants for the courts as well as for legislatures. Their work is highly legal as well as political so that it fits easily into the work of judging, especially in constitutional cases.¹⁸

The use of this kind of extrinsic evidence has tended now to be acceptable; the debate appears to be over what constitutes "proper use" and away from "absolute exclusion". It is an old debate in the United States going back many decades to the use of the Brandeis brief. The Brandeis brief, however, tends to be more sociological than legal, unlike the Law Reform Commission reports. This difference has led the Supreme Court of the United States, some would argue, to reach jurisprudentially shaky results, as in *Brown v. The Board of Education*¹⁹ under Chief Justice Earl Warren. On the other hand, others would argue that the Brandeis brief used in *Muller v. Oregon* (1908)²⁰, in which more than a hundred pages of statistics and other documentary evidence were presented to the court, was responsible for the Court's departure from the narrow ruling in *Lochner* just three years earlier. In that case the Supreme Court ruled that the New York law limiting the working hours of bakers involved "neither the safety, the morals, nor the welfare of the public".²¹

16. *Id.*

17. *Id.*, at 8.

18. For a discussion of constitutional interpretation in Canada, see Peter W. Hogg, *supra*, note 4, at 340-341.

19. 347 U.S. 483 (1954).

20. 208 U.S. 412.

21. *Lochner v. New York*, 198 U.S. 45 at 57 (1905).

In *Muller* the Supreme Court agreed that the sociological evidence presented was persuasive in determining "the extent to which a special constitutional limitation" would go, even though "technically speaking" the evidence was not constitutionally authoritative. The use in Canada of such extrinsic aids has not yet reached the level of the Brandeis brief with the possible exception of the *Anti-Inflation* case. The debate in Canada tended, until very recently, to revolve around the problem of proper use and judicial discretion. Indeed, one senses from recent extra-legal comments from members of the bench in Canada that the courts are looking for guidance in this matter; they give the impression that they would welcome a thorough airing of the issues and the implications involved. Professor Charles has played a central role in this matter. He warns that unless the legislature takes a stand on the issue and gives guidance to the courts, the courts could begin to resolve the matter themselves within the context of judicial discretion. But Charles is not overly optimistic. If the recent attempt of Lord Scarman in the Parliament of the United Kingdom is an example of what might happen in Canada, there is little grounds for optimism. Lord Scarman, acting on the recommendations of the Law Reform Commission of the United Kingdom and Scotland and the Renton Committee on the Preparation of Legislation introduced an Interpretation Bill into the House of Lords in 1980 and 1981.²² That bill failed after members of the British bar objected on the grounds that the admission of extrinsic evidence would increase the cost of litigation by lengthening trials through the introduction of marginally relevant material. In short, the British bar preferred to function under the present divergent practice.

IV. History and the Intention of Parliament

Charles makes it clear that a central, if not *the* central, question revolves around the widely held belief that it is the function of the judge to seek out, in the language of the act, the intention of the legislator. We must now turn to this important question and explore the extent to which Canadian courts (including the Judicial Committee) have set about to determine the intention of the legislature.

As with many contentious legal issues the problem of intention of the legislature has been more fully and vigorously debated in the United States than in Canada. Indeed the problem of intention of the framers in the United States seems to be a ghost that refuses to be exorcized. The recent flurry of writings and comments on the question of intention of the

22. House of Lords Debates on Interpretation of Legislation Bill, 13 February, 1980, at 275-306, and 9 March 1981, at 63-84.

framers was prompted by Edwin Meese, Attorney General of the United States. Speaking to British lawyers in London, Meese opened the proverbial can of worms with his musings on how the court, especially the Supreme Court of the United States, should not supplant the intention of the framers by its collective and subjective views of the constitution.²³ This prompted a reply from Justice William Brennan who vigorously championed an alternative position.

Much abuse has been heaped upon the heads of those who would direct judicial attention to the intention of the framers. Myres McDougal and Asher Lans scornfully rejected such an approach with the charge that it constituted "filio-pietism" or "verbal archeology".²⁴ Others, agreeing with McDougal and Lans, claim that the framers themselves intended to leave it "to succeeding generations (of judges, presumably) . . . to rewrite the 'living' constitution anew".²⁵ To seek the original intention is in the minds of some authorities to freeze its original meaning. No less a distinguished American constitutional authority than Edwin Corwin dismissed in 1925 the "speculative ideas about what the framers of the constitution . . . intended" it should mean "because the main business of constitutional interpretation . . . is to keep the constitution adjusted to the advancing needs of time".²⁶

Other authorities insist that the intention of the legislators or framers is the principal means of ensuring that the judiciary does not usurp the function of the legislative body. James Madison wrote that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers".²⁷ The intention of the framers is to be consulted and respected not because it is old or antiquated, but because it is the expression of a very thoughtful process by very thoughtful men. It is not to say that no constitutional

23. "Address, The Honorable Edwin Meese III, Attorney General of the United States", Wednesday, July 17, 1985, Grosvenor House, London, England (Washington: Department of Justice). See also Edwin Meese III, "The Supreme Court of the United States: Bulwark of a Limited Constitution" (1986), 27 South Texas Law Review 455; Edwin Meese III, "Construing the Constitution" (1985), 19 University of California Davis Law Review 22. For Justice Brennan's response to Meese, see "The Constitution of the United States: Contemporary Ratification" (1985), 19 University of California Davis Law Review 2. See Meese's response to Brennan: "The Battle for the Constitution: The Attorney General Replies to His Critics", *Policy Review*, Winter 1986, at 32-35.

24. Edward Corwin, *American Constitutional History* (Mason and Garney, eds., 1964).

25. James Madison, *The Writings of James Madison*, Vol. 9 (G. Hunt, ed. 1900-1910), 191.

26. H. Jefferson Powell, "The Original Understanding of Original Intent" (1985), 982 Harvard Law Review 885 at 887.

27. *Id.* at 888.

amendments are proper or desirable. The legislative process must always be available to effect such changes.

The alternative to judicial respect for the intention of the framers is to substitute the whim of judges caught up in the give and take of the emotions of the moment. One shudders at what might have happened in the United States during the McCarthy era if judges had not calmed the emotional storms by appealing to the intention of the framers in questions of free speech and association.

What is ironic in this struggle for the intention of the framers is that the denigration of the framers' intentions is of relatively recent origin. As H. Jefferson Powell notes: "Contemporary intentionists are correct . . . in claiming that resort to 'original intent' is an interpretive strategy of great antiquity in American constitutional discourse".²⁸ But as Powell points out, "To the extent that constitutional interpreters considered historical evidence to have any interpretive value, what they deemed relevant was evidence of the proceedings of the state ratifying conventions, not of the Intent of the framers".²⁹ In other words, it was not the alleged, real or apparent wisdom of individual framers that was sought but the collective wisdom of the framers as a whole. This distinction is very important when applied to Canada. John A. Macdonald was not by any stretch of the imagination a profound constitutional thinker. But when he is considered in the context of the entire constitutional debate — in which he vied with brighter men such as Christopher Dunkin — his views became important. The individual participants in the give and take of debate are not as important as the general perspective and conclusions reached as a result of the debate. And those perspectives and conclusions are available in the various legislative debates. In sum, the quest for the intention of the framers is a form of deference to the legislature.

Furthermore, we must not dismiss too quickly the possibility that the framers saw the broader, more permanent issues more clearly than we do today. To say that they did not see (could not have seen) the modern developments in science and technology is beside the point. The constitutional arrangement can accommodate these kinds of changes. What is important are the values of the community ensconced in the original document. Those intangible values go into making a community distinct and worth preserving. The quest for the intention of the framers is, hence, a quest for and a reaffirmation of those fundamental values.

In Canada the issue of intention of the Fathers of Confederation has almost been permanently put to rest. The question as to whether the

28. *Id.* at 885.

29. *Id.*

Judicial Committee did or did not seek and follow the intention of the Fathers of Confederation is an antiquarian issue. It has never been formally resolved, but it is rarely ever discussed. The leading authorities in recent years — Alan Cairns and G.P. Browne³⁰ — are on the opposite sides of the issue. They agree only on the fact that what the Judicial Committee did was good for Canada. They, of course, stand in marked contrast to an earlier generation of constitutional scholars such as Kennedy and Forsey who claim that the Judicial Committee consciously distorted the terms of the *Constitution Act, 1867*.

The considerable literature on the subject is instructively confusing. Sir Ivor Jennings, writing in the *Harvard Law Review* claimed a half century ago that the Judicial Committee “has never seriously wavered from the principle that it was their function to interpret the ‘intention of Parliament’ as laid down in the Act and not to fit the Constitution to the changing conditions of social life”.³¹ This stands in contrast to Alan Cairns’ claim that the law lords took into account in their judgment the sociological conditions, that they did not restrict themselves to the language of the *Constitution Act*.³² Both sets of comments tend to be contradicted by the explicit comments of the law lords. Viscount Haldane, speaking of Lord Watson, wrote, for example, that “He was an Imperial judge of the very first order. The function of such a judge, sitting in the supreme tribunal of the Empire, is to do more than decide what abstract and familiar legal conceptions should be applied to particular cases. His function is to be a statesman as well as a jurist, to fill in the gaps which Parliament has deliberately left in the skeleton constitution and laws that it had provided for the British colonies”.³³ The question for our purposes here is: to what extent does this perception of the judicial function permit judges to use historical material? Or, on what grounds may the court (the Judicial Committee) set aside the language of the act in the process of “filling in the gaps” of the “skeleton constitution”? The Judgments of the Judicial Committee show that it did not adopt a single course of action. At times it displayed concern about the intention of Parliament as in *Parsons* (1881).³⁴ Usually in such circumstances the

30. See Alan Cairns, “The Judicial Committee and Its Critics” (1971), 4 *Canadian Journal of Political Science* 301-45; G.P. Browne, *The Judicial Committee and the British North America Act* (Toronto: University of Toronto Press, 1967). For a reply to both Cairns and Browne see Frederick Vaughan: “Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation” (1986), 19 *Canadian Journal of Political Science* 495.

31. *Harvard L.R.* (1937), at 35.

32. Cairns, *supra*, note 30.

33. Viscount Haldane, “Lord Watson” (1899), *Judicial Review* 278.

34. See Montague Smith in *Parsons*, 7 A.C. 96 at 108.

board was concerned to understand what Parliament could not have intended. The overwhelming preoccupation of the law lords was with articulating a conception of federalism that gave fundamental legislative powers to the provinces in virtual defiance of the logic of the *Constitution Act, 1967*. As late as 1937 the Judicial Committee drew back from according paramount power to the Parliament of Canada. Lord Atkin, for example, feared that "to hold otherwise (than in favor of the provinces) would afford the Dominion an easy passage into the provincial domain".³⁵ No matter that the Fathers of Confederation may have intended Parliament to have an "easy access". There was a clear disposition, especially throughout the early years, among members of the Judicial Committee to resolve in their own minds a conception of federalism rather than to uncover the intention of Parliament, or better, of Parliament's conception of federalism.³⁶

Nevertheless, the Judicial Committee did address the issue of the role of history. In the *Tiny Township* case, for example, Viscount Haldane began by asserting that their lordships would resolve the issue "as one of pure legal interpretation".³⁷ Haldane then made it clear that it was necessary for the Board to take into account "the history of education of Canada" as an aid in resolving the dispute. Indeed, as to the central question of the rights of separate school supporters, Haldane repeated that "it is necessary to look at the history of the development of education in Canada".³⁸ Having been persuaded by the weight of historical evidence that "a settlement which in so far as it remained unaltered at Confederation, must be strictly maintained",³⁹ Haldane then retreated from the force of the historical evidence to the traditional interpretation of the language of the 1867 Act. The historical considerations, which took up so much of his lordship's time in his judgment, did "not relieve a Court of law from the obligation to confine itself strictly to the meaning of the words which define the legal rights".⁴⁰ The inherent unsatisfactory nature of this judgment left it as a legal problem to the present day.

Canadian courts have given every indication that they will take Confederation history into account. As recently as 1983 in *The Attorney-General of Canada v. Canadian National Transportation Ltd.*, the late Chief Justice Laskin, writing for himself and six of his colleagues, openly acknowledged that he "examined the pre-Confederation debates in the

35. Browne, *supra*, note 30 at 31.

36. See note 30 *supra*.

37. *Roman Catholic School Trustees v. the King* (1928), J.C. 363 at 367.

38. *Id.*, at 376.

39. *Id.*, at 385-386.

40. *Id.*, at 386.

then provincial Parliament of Canada".⁴¹ Laskin roamed throughout the 1865 Legislative debates and cited John A. Macdonald, Hector Langevin and Christopher Dunkin in an effort to understand the scope of the federal authority over criminal law.

In the more recent Ontario Court of Appeal reference respecting the extension of full funding to separate schools, both the court minority and court majority relied extensively on the history of education in pre-Confederation Canada. In effect, the reference re-opened the *Tiny Township* case. Indeed, at times one gets the impression that the courts are being asked to settle not a legal but an historical problem. At the outset of his minority judgment, Chief Justice Howland claimed that it was necessary "to trace the history of the separate school system in Ontario in order to determine what rights or privileges Roman Catholics had by law at the time of Confederation under s.93(1), and the effect of legislation subsequently enacted".⁴² It is important to understand that the historical record contained, in Howland's view, evidence as to "rights" and "effect" of subsequent legislation. Small wonder he proceeded systematically throughout the pre-Confederation, Confederation and post-Confederation historical records in an attempt to resolve the issue of separate school rights to full financial support. But the Ontario Chief Justice even went into the history of the *Canadian Charter of Rights and Freedoms* in an effort to find the intention of Parliament with respect to s.29.⁴³ This included judicial scrutiny of earlier drafts⁴⁴ of the *Charter* as well as the Judicial Committee judgment in the *Tiny Township* case.

Unfortunately, the court majority also appealed to the same historical record. Justice Walter Tarnopolsky writing for the majority not only researched extensively the legislative debates of 1865, he also referred to Parliamentary debates on remedial legislation 30 years later. On section 29 of the *Charter*, Tarnopolsky observed that it "is interesting to note that s.29 did not appear in the initial proposal for the *Charter*, in October, 1980. In fact, it was not added even after the representations made to the Special Joint Committee during late 1980, pursuant to which the Minister of Justice proposed a number of amendments on 14 January, 1981".⁴⁵ Tarnopolsky dwelt at length on the Joint Committee

41. (1983), 2 S.C.R. 206 at 225.

42. In the Matter of a Reference to the Court of Appeal (Ontario) . . . respecting Bill 30, An Act to Amend the Education Act to provide full funding for Roman Catholic Separate Schools, February 18, 1986. Mimeo, p. 8, 9 (Hereinafter referred to as Ontario Separate School Funding Case).

43. *Id.*, at 65.

44. See Robin Elliot, "Interpreting the *Charter* — Use of Earlier Versions as an Aid" (1982), University of British Columbia Law Journal, Charter Edition 11.

45. Ontario Separate School Funding Case, 1986, at 19.

proceedings in an effort to determine the importance to be accorded to s.29 of the *Charter*. In short, the same historical record led the court majority to reach conclusions opposite to those reached by the Chief Justice.

In another Ontario Court of Appeal reference involving minority language educational rights, the Court noted, before embarking upon a long historical foray into the records surrounding minority language rights, that history "while not determinative in the construction of statutes, provides insight into the background of a statute".⁴⁶ It is difficult not to conclude that the Ontario Court of Appeal majority and minority in the Bill 30 reference did not use history as a determinative manner. The Ontario Court of Appeal in the minority language education reference claimed that the *Charter* has changed significantly the nature of constitutional review. The Court said:

With the enactment of the *Constitution Act, 1982*, the dominant principle of constitutional law is no longer centered exclusively on the division of legislative authority between the federal and provincial levels of government. The preservation and enforcement of the guaranteed rights, including minority language educational rights, and of fundamental freedoms have changed the focus of constitutional law and the role of the courts. We believe that the court's concern for these rights requires a move away from narrow and strict constructionalism towards a broader approach, which would include a consideration of the historical developments, particularly in the field of education.⁴⁷

The Court went on to say that it saw no difficulty considering "relevant political, economic, social and cultural developments".⁴⁸ As to what the courts would do with such material, a unanimous five-man Ontario Court of Appeal left no doubt: "Such considerations may serve to broaden our approach to the issue at hand, and it avoids resort to strict legal principles of interpretation. We would include in our considerations the conditions and contemporary facts which existed before and at the time of the drafting of the *Constitution Act, 1982*, in order to be able to ascertain the interest of the constitutional amendments providing for the protection of minority language education".⁴⁹ In light of these comments it is not surprising to find the Court citing the writings of historians such as Mason Wade and a full range of Parliamentary reports as well as a number of law review articles, some of which were written by Justice

46. Reference to the Court of Appeal (Ontario) re *The Education Act*, R.S.O. 1980, Chapter 129 and Minority Language Educational Rights (1984), mimeo.

47. *Id.*, at 19.

48. *Id.*, at 20

49. *Id.*

Tarnopolsky before joining the Ontario Court of Appeal. Indeed, the judgment reads more like a law review article than a court judgment.

V. History and the Capacity of the Fathers of Confederation

If there is one characteristic of Canadian constitutional history that distinguishes it from its American counterpart it is the anti-intellectual attitude of the former.⁵⁰ The great Canadian historian Donald C. Creighton enunciated that attitude most precisely when he wrote that our Fathers of Confederation were hard-headed practical politicians unconcerned with principles. This view was shared by Creighton's archrival historian, A.R.M. Lower, who wrote that: "So far did the practical legal spirit go that the proposed (Confederation) got little debate from the point of view of underlying theory".⁵¹ And this was a good thing, added W.M.P. Kennedy, a leading constitutional authority. The absence of a philosophic or theoretical spirit saved Canada, Kennedy insisted, "from much emotional challenge, from the so-called invasion of sacrosanct instruments, and from any attempt to confine (constitutional) interpretation within a preconceived Canadian notion of the essence of the Canadian system".⁵² Many Canadian historians and constitutional law professors dismissed the introduction of the American preoccupation with the founding with the charge that it was un-Canadian. They pointed proudly at Burke who suggested that a "sacred veil" be thrown over the origin of nations. Indeed, he claimed that it "is always to be lamented, when men are driven to search into the foundations of the commonwealth".⁵³ No one expressed the anti-founding view more precisely than the Austrian-born British philosopher Karl Popper when he wrote that

The social engineer and technologist, . . . will hardly take much interest in the origin of institutions, or in the original intentions of their founders . . . Rather, he will put his problem like this: If such and such are our aims, is this institution well designed and organized to serve them?⁵⁴

Clearly this spirit, whatever its source, has dominated the practical legal advice over the past several decades of constitutional reform in Canada. The original principles prompting our framers to adopt a constitutional system very different from the American founders is buried in the past not to be sought out and pondered as aids for our times. They were

50. For a refreshing departure from this trend see, Philip Resnick, "Montesquieu Revisited, or the Mixed Constitution and the Separation of Powers in Canada" (1987), 20 *Canadian Journal of Political Science* 97.

51. Lower, *Evolving Canadian Federalism* (Duke, 1958), at 86.

52. Kennedy, *The Constitution of Canada* (Oxford, 1922), at 405.

53. Speech on a Bill for "Shortening the Duration of Parliaments" (1780), *Works VII*: 71.

54. Karl Popper, *The Open Society*, Vol. I, at 23 (Princeton, Fifth Edition, 1966).

simply practical principles designed to meet the exigencies of a specific period of Canadian history, no longer useful to our present needs or purposes. (So the historians would have us believe.)

This was the orthodox view until very recently. Peter J. Smith has boldly suggested that Canadian political scientists and historians begin to understand the Confederation settlement in the light of the ideological influences of pre-Confederation sources stemming from Britain, the United States and France. He suggests that the Canadian founding in 1867 can be understood more clearly in terms of the "debate between the defenders of classical republican values and the proponents of a rising commercial ideology formulated during the Enlightenment".⁵⁵ One does not have to agree with Smith's Pocockian premises to be encouraged by his suggestions, for unless Canada was founded in a legal and constitutional vacuum, it was in important respects a product of certain identifiable theoretical influences. Smith is clearly correct to suggest that the entire period be reopened and looked at afresh, not for antiquarian reasons but for practical reasons. The reopening should assist us to understand more clearly the vision of our Fathers of Confederation; or, to put it in more acceptable modern jargon, to assist us to understand and appreciate more clearly our founding values. The quest, therefore, should be towards uncovering those *practical* principles of the framers with a view to ascertaining what the regime as a whole was designed to embody and preserve. This clearly stands as a defiant alternative to Popper and his disciples. It also stands as an invitation to reject the anti-intellectual myopia of recent writers such as Black, Smiley and Cairns whose pragmatism is based on an implicit rejection of the wisdom of our Fathers of Confederation.

This "new" history will certainly have an impact on constitutional adjudication to the extent that there is no alternative to the "intention of the framers". The *Charter of Rights and Freedoms* clearly forces our courts into the debate over intention but since the *Charter* is meant to apply to all aspects or facets of the *Constitution Act, 1867*, the original arrangement must be re-understood in terms of the intentions of the framers. The *Charter* has opened up problems not only for the future but also for the past. In the light of this development, it is incumbent upon academic historians, political scientists and law professors to return to the cellar of our nation's history for a more thoughtful reassessment of our foundations, for history is indispensable to constitutional adjudication. There is no longer any question as to whether our courts may or may not

55. See Peter J. Smith, "The Ideological Origins of Canadian Confederation" (1987), XX:I Canadian Journal of Political Science 3 for a lengthy footnote in which he cites the orthodox view from the writings of a list of contemporary writers such as Smiley.

resort to the extrinsic aid of constitutional history. There can be no constitutional adjudication worthy of the name without it.

Finally, the retreat from constitutional history can be traced to a specific period in the 19th century. Ironical as it may sound, the anti-historical judicial view emerged out of the 19th century legal positivism which was the stepchild of 19th century German historicism. The confusion in this matter can be seen in all its clarity (oxymoron intended) by a perusal of Robert W. Gordon's recent *Yale Law Journal* article on "Historicism in Legal Scholarship".⁵⁶ By "historicism", Gordon means "the recognition of the historical and cultural contingency of law". What exactly Gordon is proposing is not clear; an iconoclastic attitude towards traditional legal research is about all one gets from his musings. Certainly there are no solutions to real problems to be found in his approach:

In this delightfully heterodox climate there is reason to hope that our mainstream legal scholarship will at last move beyond its standard modes of responding to historicist assertions of the social contingency of law and legal nationalizations. Doubtless, there are solutions to the problems, but the modes as they have been practiced have inhibited the development of more interesting responses, calling forth in their turn new criticism, and so onward in a dialogue lifted clear of the old gravitational field.⁵⁷

It is difficult to see how helpful this approach to legal scholarship could possibly be. It certainly is not designed to lead scholars back to the constitutional text. As Gordon says:

The old text will be rendered almost wholly archaic if it can be shown to embody a set of conceptions — about human nature, property, virtue, freedom, representation, necessity, causation, and so forth — that was a unique configuration for its time and in some ways strikingly unlike what we believe to be our own.⁵⁸

Michael Oakeshott believes that the historian must "understand past conduct and happenings in a manner in which they were never understood at the time".⁵⁹ This would seem to ask the historian to do the impossible. At best we should expect that the historian understand the framers of our constitution as they understood themselves. To impose an alien (modern) paradigm on the past is to sin twice: it is both distortion and arrogance, the product of modern *hubris*.

VI. History and the Charter

One thing appears certain from the recent cases arising under the *Charter*: history has a central role to play. But why should the adoption of the

56. Robert W. Gordon, "Historicism in Legal Scholarship" (1980-81) 90 *Yale Law Journal*.

57. *Id.*, at

58. *Id.*, at 1021

59. *Rationalism in Politics* (London: Methuen, 1967), at 164.

Charter of Rights and Freedoms alter so profoundly the rules of constitutional construction? What is it about the *Charter* that makes history so important

There can be no question that the *Charter* has provoked several members of the Supreme Court of Canada to ponder aloud the nature of the judicial function and the use of extrinsic aids, such as history. Madame Justice Bertha Wilson, for example, in her Goodman lectures claims that "the scope of judicial review of legislative and executive acts has been vastly expanded under the *Charter*".⁶⁰ This expansion, she reasoned "calls for a more sophisticated appreciation by the judges themselves of the process in which they are engaged".⁶⁰ She spoke at length about the two general categories of judges, those "judges committed to principled decision-making for whom the rationality of the law is paramount. They want to make law only imperceptibly and incrementally by applying existing principles to fresh facts".⁶² The other category of judges "chafe at embalmed legal tradition and see *stare decisis* as a form of ancestor worship. They want to update the law and make it relevant to their times". The tension between these two schools of judging has become exacerbated by the *Charter of Rights and Freedoms*. The *Charter* virtually mandates the institutionalization of the second group mentioned by Justice Wilson. She believes that sections 1, 24 and 52 of the *Charter* effectively remove the grounds for judicial self-restraint as exhibited by the Supreme Court in *Harrison v. Carswell*.⁶³ Those sections, she claims, "effectively remove this rationale from judicial restraint by casting the judiciary in a clearly interventionist role. We can no longer rely on the doctrine of the supremacy of Parliament as a reason for staying our hand".⁶⁴ The new role for the courts forces judges out of the easy comfort of 19th century legal positivism into the realm of norms. "The challenge for the courts is to develop norms against which the reasonableness of the impairment of a person's rights can be measured in a vast variety of different contexts . . . These norms must reflect to the maximum extent possible the political ideal of a free and democratic society".⁶⁵ But how will judges arrive at these norms without the use of extrinsic aids?

Are the courts advised to consult the historical record surrounding the adoption of the *Canadian Charter of Rights and Freedoms*? Robin Elliot believes that the courts would be well advised to study the seven distinct steps through which the *Charter* progressed before it reached its final

60. Madame Justice Bertha Wilson, The David B. Goodman Memorial Lectures, University of Toronto, November 26-27, 1985. Lecture #2, at 3, mimeo.

61. *Id.*

62. *Id.*, at 1.

63. (1976), 2 S.C.R. 200.

64. Justice Bertha Wilson, *supra*, note 60 at 2.

65. *Id.*, at 9.

form in 1982.⁶⁶ Elliot claims that the various drafts reveal the extent to which such crucial *Charter* provisions as the legislative override clause (added in the sixth version) and the equality of rights provision (s. 15(1)) underwent intense scrutiny. By far and away the most important lesson for the courts from such a perusal is how the general or overall intention of the framers of the act worked its way into the final language adopted. The general drift of that development reveals the struggle for an articulation of the norms Justice Wilson was referring to in her Goodman lectures. If, as Peter Russell contends, the *Charter* mandates the judicial impositions of *national* standards then the courts would be more than advised to seek assistance in understanding what those standards are.⁶⁷

Elliot correctly observes that there has long been an uneasy flirtation with history in both the Judicial Committee of the Privy Council and the Supreme Court of Canada. And the late Bora Laskin concluded after a review of the issue of the use of extrinsic aids generally that "there has been no consistency in this matter by the Courts".⁶⁸ The reason why there remains so much uncertainty would appear to arise out of the failure to distinguish clearly between statutory and constitutional construction. As Jacobus ten Broek observed many years ago:

More serious in its consequences has been the almost universal failure to distinguish between the problem involved in statutory construction and that involved in constitutional construction. Statutes are usually efforts to accomplish individual or highly related ends. As such the conditions surrounding their origin and the intent of the legislature in passing them are matters possessing an informative value. They are the instruments of relatively small bodies composed of members presumably capable of understanding and using comparatively exact and technical language. Secondly, aside from the fact that statutes aim to meet temporary and changing conditions and the fact that they are generally judicially construed before these conditions have passed away, there is the extremely important circumstance that legislative bodies meet in frequent session and hence may change the words used if their actual intention is not effectuated. But not so constitutions! They are vastly more general and are intended to be relatively permanent. As a result of these two factors, the judicial function of moulding constitutions by construction is proportionately greater than in the case of statutes, and the court's freedom of decision is less restricted. Moreover, constitutions are framed and adopted by different bodies, and if the intent of those who gave the instrument force is to be sought, the matter of numbers alone seems preclusive, and the meaning of language must be taken from its most common, untechnical, and uniform use. Finally, if the original intent is not carried

66. Robin Elliot, *supra*, note 44 at 11.

67. Peter H. Russell, "The Political Purposes of the Canadian *Charter of Rights and Freedoms*" (1981), 61 C.B.R. 30.

68. Bora Laskin, *Canadian Constitutional Law* (Carswell, 3rd ed.) at 156.

out by the courts, there is not the ready opportunity to revise and restate which exists in the case of statutes.⁶⁹

The use of the extrinsic aid of history in constitutional construction is especially important where the intention of the framers is the duty of the court. The Supreme Court of Canada attempted to establish this point early in its history. Justice Sedgewick in *In re Prohibitory Liquor Laws* (1894)⁷⁰ wrote that:

The *British North American Act, 1867*, must be reviewed from a Canadian standpoint. Although an Imperial Act, to interpret correctly reference may be had to the phraseology and nomenclature of pre-confederation Canadian legislation and jurisprudence, as well as to the history of the union movement and to the condition, sentiment and surroundings of the Canadian people at the time. In the *British North America Act* it was in a technical sense only that the Imperial Parliament spoke; it was there that in a real and substantial sense the Canadian people spoke, and it is to their language, as they understood it, that effect must be given.⁷¹

But the early Supreme Court was clearly not unanimous in this matter. In *Severn v. The Queen* (1877)⁷² a clear difference of view emerged in the judgements of Justice Ritchie and Chief Justice Sir William Buell Richards. In a case involving the interpretation of the federal authority over trade and commerce as well as the provincial right to require licenses for the purpose of raising a revenue for local purposes, Justice Ritchie argued that the duty of the court was to apply "the golden rule" of statutory construction. The duty of the court was "to read the words of an Act of Parliament in their natural, ordinary and grammatical sense, giving them a meaning to their full extent and capacity".⁷³ The Chief Justice argued in opposition to Ritchie that the court was obliged to look at the intention of the framers and not merely at the language of the Act. Above all, the Chief Justice contended, the court must bear in mind the overall intention of the Canadian framers to avoid "the difficulties which have arisen in the great Federal Republic".⁷⁴ Chief Justice Richards viewed the efforts of the provinces to invade the federal authority over trade and commerce "pregnant with evil" and clearly "contrary to what was intended by the framers of the *British North America Act*".⁷⁵ Mr.

69. Jacobus ten Broek, "Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction" (1983), 26 Calif. Law Rev. 287 at 289.

70. 245 C.R. 170.

71. (1894), S.C.R. 231.

72. (1877), 2 SCR 70.

73. *Id.*, at 99.

74. *Id.*, at 87.

75. *Id.*, at 95.

Justice Henry had been a delegate to both the Quebec and London conferences and sided with the Chief Justice. Henry accordingly urged his colleagues to take their bearing from "the tenor and bearing of the whole Act, the state of the law at the time, the peculiar position of the United Provinces and the object of their union".⁷⁶ The tension on the Court was clearly between those who viewed the *British North American Act, 1867*, as an ordinary statute and those who viewed it as a constitutional document.

The same tension pervaded the judgments of the Judicial Committee. Lord Sankey in *Edwards v. The Attorney-General of Canada*⁷⁷ (1930) gave the most widely cited view of the Judicial Committee. Sankey wrote:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a constitution to Canada . . . their Lordships do not conceive it to be the duty of this Board . . . to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

The more generous view followed more than 50 years after the Judicial Committee had done its work by a narrow statutory construction of the terms of the *British North America Act*. The principal villains were Lord Watson and Viscount Haldane.⁷⁸ The latter could make use of history and other extrinsic aids whenever it suited his purposes. In *Snider*⁷⁹, for example, he justified the Judicial Committee's reasoning in *Russell v. The Queen* (1882) on the grounds "at the time of deciding the case of *Russell v. The Queen*, . . . the evils of intemperance at that time amounted in Canada to one so great and so general that at least for a period it was a menace to the national life of Canada so serious and so pressing that the National Parliament was called on to intervene to protect the nation from disaster."

Haldane and Watson both believed that their function as members of the Judicial Committee was to act as "statesmen". For them the art of judicial statesmanship was clearly to participate in a forward-looking process. "The state is made", Haldane wrote on one occasion, "not by external acts, but by the continuous thought and action of the people who

76. *Id.*, at 140.

77. (1930), A.C. 124.

78. In addition to articles by Cairns and Browne, cited earlier, see Stephen Wexler, "The Urge to Idealize: Viscount Haldane and the Constitution of Canada" (1984), 29 McGill Law Journal 609-50; See also Murray Greenwood, "Lord Watson, Institutional Self-interest, and the Decentralization of Canadian Federalism in the 1890's" (1974), 9 University of British Columbia Law Review. 244-279.

79. *Toronto Electric Commissioners v. Snider* (1925), A.C. 396.

live its life. In this sense it is never perfect for it is a process that remains always unbroken in creative activity".⁸⁰ The commitment to this "creative activity" left no room for a "submissive allegiance" to a founding vision.

Haldane praised Watson for rendering

. . . an enormous service to the Empire and to the Dominion of Canada by developing the Dominion constitution. At one time, after the *BNA Act* of 1867 was passed, the conception took hold of the Canadian Courts and what was intended to make the Dominion the centre of government in Canada, so that its statutes and its position should be superior to the statutes and position of the provincial legislatures. That went so far that there arose a great fight, and as the result of a long series of decisions Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the constitution of Canada took a new form. The provinces were recognized as of equal authority coordinate with the Dominion, and a long series of decisions were given by him which solved many problems and produced a new contentment in Canada with the constitution they had got in 1867.⁸¹

The prior commitment of the Judicial Committee to judicial statesmanship resulted in a political jurisprudence. The Judicial Committee was prepared to take into account the "sociological realities" of the post-Confederation period — *i.e.* contemporary history — but was not disposed to consider the historic evidence surrounding the Confederation agreement.⁸²

VII. History and Native Claims

The one area of law in Canada where history is unavoidable shows how difficult the matter really is. In native claims cases the courts are required to confront the use of history directly. A review of a few of the leading cases shows that there is considerable confusion due to the convergence of a number of problems. First, not only is the court confronted with historical documents, it is also confronted with the use of oral history. Second, the court is forced to make a decision between taking judicial notice of historical material and admitting such material in evidence. Finally, the court is caught in the common law rules governing use and ownership which might be inappropriate to claims that are rooted in an

80. M.P. Follett, *The New State*, "Introduction by Viscount Haldane", at viii (London: Longmans, Green 1926).

81. Viscount Haldane, "The Work for the Empire of the Judicial Committee of the Privy Council" (1923), 1 *Cambridge Law Review* 148.

82. See: *Maher v. Town of Portland* (1974), A.C. 362.

ancestral tradition essentially incompatible with the common law tradition.

Beginning with *Regina v. St. Catharine's Milling and Lumber Co.*,⁸³ in 1886, the courts of Canada have wrestled with the legal propriety of using historical documents. In this case as well as in *Re Eskimaux* (1939)⁸⁴ the courts used historical documents and records in arriving at their conclusions. In the first case, the Privy Council ruled that the lands reserved for the Indians were not among the properties transferred to the Dominion by the property provisions of the *British North America Act, 1867*. In the second case, historical evidence was relied upon to determine who is properly classified as an Indian. The Supreme Court of Canada ruled that the Eskimo inhabitants of Quebec are included in the aboriginal groups covered by Section 91(24) of the *British North America Act, 1867*.

The issue of native claims remained fairly quiescent until more recent years. In the leading case, *Calder v. the Attorney General of British Columbia* (1973),⁸⁵ the Supreme Court split on the essential issue of whether the Nishga Indians' aboriginal title to their ancient tribal territory had been extinguished. The Indians claimed that their aboriginal title to 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal had not been extinguished. What is important for our purposes there is that both factions on the Court (one led by Justice Judson and the other led by Justice Hall) relied heavily on history, at times the same historical material. Judson cited a history of Indians in British Columbia by Wilson Duff, an anthropologist. Relying in part on the *St. Catharines* case, Judson asserted: "I base my opinion upon the very terms of the Proclamation and its definition of its geographical limits and upon the history of the discovery, settlement and establishment of what is now British Columbia".⁸⁶

Hall, in dissent, claimed that: "Consideration of the issues involves the study of many historical documents and enactments reviewed in evidence".⁸⁷ He then went on to say that: "the Court may take judicial notice of the facts of history whether past or contemporaneous". He then asserted for the first time in Canadian law that "the Court is entitled to rely on its own historical knowledge and researches".⁸⁸ This clearly takes

83. (1886), 10 O.R. 196. For Judicial Committee judgment, see *St. Catharine's Milling and Lumber Co. v. the Queen* (1889), 14 A.C. 46.

84. (1939), S.C.R. 104.

85. (1973), S.C.R. 313.

86. *Id.*, at 323.

87. *Id.*, at 346.

88. *Id.*

the courts beyond judicial notice. As a preliminary observation to his dismissal of Chief Justice John Marshall's comments in *Johnson v. McIntosh*⁸⁹ (upon which Judson had relied in his judgment), Hall said: "The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species".⁹⁰ This led Hall to dismiss Marshall's judgment in *Johnson v. McIntosh* as "ill-founded".

While Hall makes the distinction between historical evidence and taking judicial notice, in fact the distinction is unimportant to him. He accepts historical material as determinative, as the foundation for his legal judgment. It is more of a tribute to Hall's dissenting judgment in this case that the *Calder* case has become so celebrated.

The more recent native claims cases, arising principally in Ontario and British Columbia, have raised a few of the problems below the surface in *Calder* and have prompted serious legal concerns. In the case of *Regina v. Bartleman*,⁹¹ a British Columbia Court of Appeal case, Justice Lambert raised the hackles of many court watchers when he embarked upon his own archival researches.

Bartleman is a member of the Tsarlip Indian Band, descendants of the Saanich people who made the North Saanich Treaty with Great Britain on February 11, 1852. In 1982 he shot and killed a deer and was promptly charged under the *Wildlife Act* of British Columbia. Apparently Bartleman did not know that the property on which he shot the deer was privately owned or that hunting was prohibited. Bartleman argued that he was exercising his right to hunt under the 1852 treaty and that he was exempt from the *Wildlife Act* by virtue of the *Indian Act*.

Justice Lambert not only took judicial notice of the appropriate historical facts in this case, he foraged in the archives and history libraries on his own in order to verify independently evidentiary material presented at trial. One commentator on the case objected on the grounds that the "judicial function is not to investigate independently but to judge the merits of the positions of the parties before the court".⁹² This case confronted even more directly than *Calder* the limits of the judge's

89. (1823), 8 Wheaton 543, 21 U.S. 240.

90. *Supra*, note 85 at 346.

91. (1984), 12 D.L.R. (4th) 73; 55 B.C.L.R. 78 (B.C.C.A.).

92. M.H. Ogilvie, "Evidence — Judicial Notice — Historical Document and Historical Facts — Indian Treaty Rights" (1986), 64 Canadian Bar Review 183 at 189.

function as an independent historical researcher, for in *Calder* the court did not undertake independent research. The *Bartleman* case is important for the law of evidence because of the precedent-setting conduct of Lambert. His judgment contained a lengthy section entitled: "Judicial Notice of Historical Facts". Anticipating critical comments in this connection, Lambert, J.A. explained: "To the extent that these writings deal with facts that I was then able to verify independently by examining the letters and the written component of the treaties, and no further".⁹³ As M.H. Ogilvie has related, the weight of authoritative judicial and non-judicial opinion is against judges presuming to do such things in a trial.⁹⁴ One of Ogilvie's concerns was that Lambert's independent researches might tempt him "to read other materials which may influence his perception of the case".⁹⁵

Ogilvie believes that following the leading authorities, judges may with reason take judicial notice of historical facts. She contends that if historical material is introduced in evidence, it must be subject to the rigorous rules of evidence.⁹⁶

Many of the same issues emerged in a recent Ontario case involving native land claims. In *Attorney-General for Ontario v. Bear Island Foundation* (1985),⁹⁷ the court addressed the problem of unrecorded history, or oral history. The case, currently on appeal to the Supreme Court of Canada, is unusual to the extent that it was initiated by the Crown. The issue is: Did the Crown own some 4,000 square miles of land in the Lake Nipissing region of Ontario or did a group of Indians own it by virtue of aboriginal title? The Indians claimed title by virtue of the Royal Proclamation, 1763, and by aboriginal title at common law. Mr. Justice Steele, in a lengthy judgment, wrote: "Indian oral history is admissible in aboriginal land claim cases where their history was never recorded in writing". The learned judge castigated counsel for the Indians for not calling as witnesses more Indians who could give oral testimony to their historic claims. Indeed, Justice Steele, at one point gave the impression the Indian oral history was to be given special weight. He wrote: "Facts concerning these matters should be supported by historical, anthropological or other expert evidence, but the defendants should not rely entirely on non-Indian historical, anthropological or other evidence when Indian evidence is available".

93. *Supra*, note 91 at 82

94. *Supra*, note 92 at 188-194.

95. *Id.*, at 189.

96. *Id.*, at 197.

97. *A.G. for Ontario v. Bear Island Foundation* (1985), 49 O.R. 392.

Justice Steele ruled that the Indians had a claim to use the land by virtue of the Royal Proclamation of 1763. He wrote:

I do not accept the defendants' argument that a broad liberal interpretation of the Royal Proclamation gives the Indians the right to use the lands for any purpose that they may choose over the succeeding centuries. The essence of aboriginal rights is the right of Indians to continue to live on their lands as their forefathers lived. It is nothing more and it is nothing less than that . . . I conclude that the royal Proclamation gave to the Indians only the right to continue using the land for the purposes and in the manner enjoyed in 1763.⁹⁸

There are several other cases currently in the judicial pipeline containing these issues.⁹⁹ A few will undoubtedly reach the Supreme Court of Canada in the near future. No one can predict how the Supreme Court will rule in these cases. There is no doubt, however, that it will have to confront directly the questions of the use of history in these and other kinds of cases. Up to this point the Supreme Court has not issued an authoritative set of guidelines on this important subject.

VIII. Conclusion

The present Supreme Court has confronted the use of history in two recent cases. In the British Columbia *Motor Vehicle Act* case,¹⁰⁰ Justice Lamer, after noting that the *Canadian Charter of Rights and Freedoms* has extended the scope of constitutional adjudication, reviewed the issue of history in several earlier Supreme Court cases. He cited the Senate reference case. The Court ruled in that instance:

It is, we think, proper to consider the historical background which led to the provision which was made in the Act for the creation of the Senate as a part of the apparatus for the enactment of federal legislation. In the debates which occurred at the Quebec Conference in 1864, considerable time was occupied in discussing provisions respecting the Senate.

Lamer then went on to refer to the late Chief Justice Laskin's use of pre-Confederation history in the *Canadian National Transportation* case.¹⁰² He concluded that he would follow the same course "when interpreting the *Charter*", even to the extent of using the "Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution". But

98. *Id.*

99. For a more complete discussion of Indian land claims and the use of history, see David R. Williams, "Native Land Claims — Rule of History or Rule of Law?" (A paper presented at the conference on Law and History, Carleton University, Ottawa, June, 1987).

100. *In the Matter of a Reference re Section 94(2) of the Motor Vehicle Act*

101. *Re Authority of Parliament in Relation to the Upper House Reference* (1980), 1 S.C.R. 54.

102. (1983), 2 S.C.R. 206.

Lamer drew back from using speeches in the legislature or parliament as authoritative. In this matter he preferred to follow the thinking of Justice McIntyre in *Reference re Upper Churchill Water Rights Reversion Act*¹⁰³ (1984) and Chief Justice Dickson in *Reference re Residential Tenancies Act*, 1979.¹⁰⁴

Lamer's final conclusion with respect to the use of the historical record surrounding the *Charter* is very cautious. One of the reasons for rejecting historical materials as authoritative was Lamer's belief that the intention of the authors of the *Charter* could not be clearly known. "How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?"¹⁰⁵

But Lamer's main reason for being bound by the historical materials was the fear of freezing in time the values contained in the *Charter*. "Another danger with casting the interpretation of s.7 in terms of the comments made by those heard at the Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs". In other words, the historical record could restrict the Court in the exercise of its expanded function.

Less than six months later, the Supreme Court once again roamed throughout legislative history in *MacDonald v. The City of Montreal*.¹⁰⁶ Writing for the Court majority (Justice Wilson dissenting), Justice Beetz reviewed the historical record attending section 133 of the *Constitution Act, 1867* as had the appellants. But Beetz concluded that the historical record, far from supporting their positions, squarely contradicted them. Nothing would tend to illustrate more clearly the dangers of using historical material. But this did not prevent Beetz from canvassing the Confederation records for both general and specific assistance. He wrote: "What this historical record demonstrates is that the Fathers of Confederation were quite familiar with the old and thorny problem of language rights . . . In a historic constitutional agreement, preceded by Quebec Resolution 46, which was carefully redrafted several times, the Fathers of Confederation chose the last mentioned system for judicial purposes combined with compulsory bilingualism for the purposes of legislation".¹⁰⁸

103. (1984), 1 S.C.R. 297

104. (1981), 1 S.C.R. 714 at 721.

105. B.C. Motor Vehicle *Reference*, 26 and 27 (mimeo.).

106. (1986), unreported at the time of writing.

108. *Id.*

As a general conclusion on the present Supreme Court's attitude towards the use of history one can say that it stands in contrast to the not-too-distant past. As Peter Hogg observed ten years ago: "The courts have generally rejected the 'legislative history' of the *British North America Act* as an aid to construction . . . It is difficult to defend this exclusion".¹⁰⁹ In the space of a decade, due principally to the *Charter's* impact, the Supreme Court of Canada has developed an historical consciousness in constitutional matters and is likely to continue to do so but not without some considerable confusion as to what is and is not proper history. Indeed, there appears to be every reason to believe that history will be used by Canadian courts. The issue remains, as M.H. Ogilvie has pointed out, whether those courts should subject the historical evidence to the normal rules governing evidence. The fear is, however, that history will enter our jurisprudence by the back door of judicial notice.

109. *Supra*, note 4 at 97.